BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON MCCREADY	)	
Claimant	)	
	)	
VS.	)	
	)	
PAYLESS SHOESOURCE	)	
Respondent	)	Docket Nos. 1,024,685 & 1,024,687
	)	1,024,688 & 1,025,456
	)	
AND	)	
	)	
FIDELITY & GUARANTY INS.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 10, 2007 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on January 8, 2008.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the claimant. James C. Wright, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that there is no dispute as to the ALJ's findings and conclusions with respect to Docket No. 1,024,685 nor with regard to the same in Docket No. 1,024,687. Accordingly, that portion of the Award that deals with those two docketed claims can be summarily affirmed and it is so ordered.

And pursuant to the parties' communications with the Court following the oral argument, the parties have withdrawn the issue of credit for the temporary total disability payments against the claimant's functional impairment award in Docket No. 1,024,688.

In addition, respondent concedes that claimant is presently permanently and totally disabled. But there is no admission with respect to the causal connection between claimant's work activities, her fall of September 9, 2005 (or any other accidents) and her present condition. Finally, the parties agree claimant bears a 5 percent permanent partial impairment to the whole body (low back) although respondent does not concede that the September 9, 2005 accident was a compensable event, nor does it concede that the low back impairment is attributable to the September 9, 2005 accident.

ISSUES

With respect to Docket No. 1,024,688, respondent argues that claimant's right ankle impairment (which the parties stipulate was 10 percent) is not attributable to the claimant's fall but rather, due to her diabetic condition as evidenced by Dr. Baker's testimony.

Docket No. 1,025,456 arises out of a fall that occurred on September 9, 2005 as claimant was returning to work from a doctor's appointment where she was being rated for her earlier accidents. The ALJ found this fall was compensable and that claimant sustained a 5 percent permanent partial disability to her leg at the level of the knee. The ALJ also found that claimant was permanently and totally disabled, but concluded that claimant was already permanently and totally disabled as of September 9, 2005 "although no one realized it at the time".[1] He also concluded that she was not entitled to any work disability under K.S.A. 44-510e(a) as she had sustained only a scheduled injury to her lower extremity, rejecting claimant's contention that her back was injured or further aggravated by the accident.

Claimant contends she suffered a compensable accident on September 9, 2005 and as a result, has suffered permanent impairments to her right knee, low back and hip as evidenced by Dr. Koprivica's testimony. And because she is no longer capable of substantial gainful employment, she is therefore permanently and totally disabled.

Respondent maintains that claimant's fall on September 9, 2005 was not compensable as it did not arise out of and in the course of her employment. And even if compensable, she sustained only a knee impairment. Respondent stridently maintains that claimant's back complaints are related to a chronic back problem that existed before most of her accidents and that her present condition, her permanent total disability status, is attributable to claimant's unrelated and preexisting conditions.

[1] ALJ Award (Oct. 10, 2007) at 7.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award set out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein except as hereinafter noted.

DOCKET NO. 1,024,688

Claimant's testimony, which is uncontroverted, is that she was at work on March 17, 2005 when she turned her right ankle after stepping on a roll of tape. She continued to work even though the ankle was swelling as she walked up and down the steps during the balance of her work day. Claimant continued to work at her normal work duties, but sought treatment in July 2005. Respondent referred claimant to Dr. Meade who put her on light duty.

There is no dispute that claimant suffered an accident on March 17, 2005 when she turned her ankle. The dispute stems from the fact that claimant also suffers from diabetes and according to Dr. Baker, the physician who respondent retained to provide a rating examination, claimant's ankle injury was caused by the diabetic condition rather than the accident claimant describes. No other physician came to this conclusion and like the ALJ, the Board is not persuaded by this testimony. Thus, the ALJ's Award in Docket No. 1,024,688 is affirmed in all respects.

DOCKET NO. 1,025,456

Respondent contends this accident is not compensable because claimant fell, walking towards respondent's building, an act that constitutes an activity of day-to-day living. Thus, under the *Johnson*[2] rationale, claimant's resulting injuries are not compensable. Claimant contends this was an unexplained fall on respondent's premises that is compensable.

The ALJ concluded that claimant's fall was compensable either because it happened on respondent's premises, or because she was returning from the medical examination

[2] *Johnson v. Johnson County*, 36 Kan. App. 2d 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

compelled of her for an earlier workers compensation injury. In either instance, the ALJ concluded the claimant's unexplained fall was compensable. The Board agrees for a different reason.

The majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.[3] In *Hensley*[4], the Kansas Supreme Court adopted a similar risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

Moreover, although getting out of a car and turning to walk on a sidewalk could be described as a normal activity of day-to-day living, K.S.A. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this case there was a specific onset of injury caused by an accident at work. There is no persuasive medical evidence in this case that claimant's disability resulted from the effects of the ordinary wear and tear common to acts of everyday living on a preexisting condition.[5] Neither is this a case where claimant had a preexisting condition which was worsened or made symptomatic by a solely personal risk.[6] The Board finds claimant's unexplained fall was a neutral risk and as such arose out of and in the course of employment.

Because respondent concedes the claimant is permanently and totally disabled, the focus of the balance of this appeal is on the *cause* of her inability to engage in substantial gainful employment. To be sure, claimant had a number of unrelated health issues at work on her body before September 9, 2005, including diabetes, previous injuries, significant obesity and arthritis. Nonetheless, claimant was able to perform her regular job duties.

Claimant's job was, by all accounts, rather physical and fast paced. Before her third accident in March 2005, claimant continually received and packed as many as 600 pairs of shoes per hour, delivered from a number of different chutes, standing on her feet nearly all day, meeting all of her output requirements. She also played in a bowling league that met

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[3] *1 Larson's Workers Compensation Law*, § 7.04[1] (2003).

[4] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[5] See *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[6] See *Martin v. U.S.D. No. 233,* 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

3 times a week, 3 games per night. She engaged in a number of hobbies, and was able to ambulate without difficulty and clean her house, in spite of her weight, approximately 480 pounds. And the one physician who saw her in the hours before her fall declared her to be at maximum medical improvement with respect to her ankle injury and having no permanent impairment.[7]

Following the September 9, 2005 accident, claimant's activities became drastically curtailed. Claimant returned to work, performing light duty, and propped her knee up while working. She was referred to Dr. Mead and later to Dr. Lepse, an orthopaedic physician who performed an arthroscopic procedure. Once taken off work for this procedure, claimant never returned as respondent's policy was to provide light duty for 90 days and that period ran out at the end of September 2005.

Claimant testified that she is presently wheelchair-bound as her back pain keeps her from walking more than 8-10 steps, pain that she says began after the September 9, 2005 accident. However, the ALJ concluded claimant's credibility on this issue was suspect.

Claimant denies any longstanding back problems before September 9, 2005. Yet, there is some testimony that claimant was observed by her supervisor sitting down, complaining of pain in her back and her knee at some point before the September 9, 2005 accident. And in her conversations with her supervisor claimant disclosed that she had seen a chiropractor for her back problems. According to claimant she had only seen Dr. Tennant 4 times, but the medical records reveal a much more extensive history, encompassing 41 visits. In the 5 months before September 9, 2005, there were only 4 visits. Dr. Tennant's testimony suggests that his records indicate that he merely copied each earlier entry when he was treating her for her back complaints. And while claimant doesn't deny seeing Dr. Tennant, she does not remember 41 visits. Thus, Dr. Tennant's records and his testimony seems to be of limited value, except to call into question claimant's contention that she had no previous back problems until September 9, 2005, when she fell getting out of the car.

There is also some evidence that claimant magnifies her symptoms and her complaints. For example, when Dr. Koprivica attempted to examine her, he could not so much as touch her without her writhing in pain. Thus, his examination was essentially limited to a document review. Other physicians encountered the same symptom magnification. And they were not privy to her chiropractic history of back treatment. But there is universal agreement that claimant has sustained a 5 percent permanent impairment to her back as a result of her September 9, 2005 accident.

[7] Mead Depo., Resp. Ex. 2.

The ALJ concluded as follows:

> By the time the claimant fell in September 2005 she was in essence already permanently and totally disabled, although no one realized it at the time. Because of her ankle she would never be able to return to anything other than sedentary employment, and as noted above, she is unqualified for this. Her light duty was to end at the end of September; regardless of whether there was another accident the claimant was to be permanently unemployed then. Thus the ankle pathology "essentially set the level of disability." *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 96 (2000).[8]

Thus, the ALJ went on to award claimant a functional impairment to her knee only as a result of the September 9, 2005 accident, rejecting her claim that she was permanently and totally disabled as a result of the accident or that she sustained an injury or aggravation to her back.

The Board has considered this matter and the majority finds the ALJ's conclusion should be reversed. Admittedly, claimant's credibility is somewhat compromised as there is some evidence that she had back complaints before her September 9, 2005 accident. While she admits some 4 back treatments by the chiropractor, the records suggest a more extensive period of treatment. And her failure to disclose this treatment to all of the physicians calls into question their opinions.

Nonetheless, the majority of the Board concludes that the 5 percent permanent partial impairment to claimant's back is attributable to the September 9, 2005 accident. Similarly, the majority also finds that claimant is permanently and totally disabled as a result of that same accident. Up until September 9, 2005,(although she was tentatively on light duty as a result of her ankle accident) claimant had performed her work, without accommodation. Although she had some complaints about back pain over the years, she continued to work and engage in her hobbies, including bowling, and her condition showed no tendency to affect her ability to perform those activities. Claimant was, by virtue of her ongoing and unrelated health conditions, in a rather fragile health state as of September 9, 2005. And it appears from the greater weight of the evidence that the fall of September 9, 2005 was the proverbial "straw that broke the camel's back". For these reasons, the ALJ's Award in Docket No. 1,025,456 is reversed and claimant is awarded a 5 percent permanent partial impairment to the body as a whole for her back complaints and she is further awarded permanent total disability benefits as of September 9, 2005.

[8] ALJ Award (Oct. 10, 2007) at 7.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated October 10, 2007, is affirmed in part and reversed in part as follows:

DOCKET NO. 1,024,685

The ALJ's Award is affirmed in all respects.

DOCKET NO. 1,024,687

The ALJ's Award is affirmed in all respects.

DOCKET NO. 1,024,688

The ALJ's Award is affirmed in all respects.

DOCKET NO. 1,025,456

The ALJ's Award is reversed as follows:

The claimant is entitled to 56.14 weeks temporary total disability compensation at the rate of $310.68 per week or $17,441.58 followed by 8.00 weeks of temporary total disability compensation at the rate of $337.21 per week or $2,697.68 followed by permanent total disability compensation at the rate of $337.21 per week not to exceed $125,000.00 for a permanent total general body disability.

As of February 13, 2008 there would be due and owing to the claimant 56.14 weeks of temporary total disability compensation at the rate of $310.68 per week in the sum of $17,441.58 plus 8.00 weeks of temporary total disability compensation at the rate of $337.21 per week in the sum of $2,697.68 plus 62.57 weeks of permanent total disability compensation at the rate of $337.21 per week in the sum of $21,099.23 for a total due and owing of $41,238.49, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $83,761.51 shall be paid at $337.21 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

This Board Member respectfully dissents from the majority's opinion. This Board Member would find that claimant's credibility has been compromised by her denials of previous back complaints in the light of the records detailing significant chiropractic treatment. And as a result, this Board Member would find that claimant has failed to meet her burden of proof of establishing that her low back complaints were attributable to her September 9, 2005 fall. Moreover, this Board Member would also find that claimant's act of walking on the sidewalk towards respondent's building is an act of day-to-day living and under *Johnson*, her fall is not compensable.

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge